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# In the Supreme Court of the United States

EXPRESSIONS HAIR DESIGN, *et al.*,
*Petitioners*,

v.

ERIC T. SCHNEIDERMAN, *et al.*,
*Respondents*.

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit*

## BRIEF OF *AMICUS CURIAE* THE MARION B. BRECHNER FIRST AMENDMENT PROJECT IN SUPPORT OF PETITIONERS

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## IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

**The Marion B. Brechner First Amendment Project** is a nonprofit, nonpartisan organization located in the College of Journalism and Communications at the University of Florida in Gainesville. Directed by professor and attorney Clay Calvert, the Project is dedicated to contemporary issues of free expression, including current cases and controversies affecting freedom of information and access to information, freedom of speech, freedom of press, freedom of petition, and freedom of thought. This case presents issues affecting freedom of speech – namely, both the First Amendment right of merchants to speak and the First Amendment right of consumers to receive speech.

The Project's arguments thus may assist the Court in deciding this matter. As an organization dedicated to research into First Amendment rights, and advocacy in support of such rights – though one with no direct stake in the outcome of this case – the Project is well-positioned to offer this Court information about issues affecting the First Amendment speech rights of both merchants and consumers.

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[1] Pursuant to Rule of Court 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission. Counsel of record received timely notice of the intent to file this brief under this Rule, and the parties have provided written consent for the filing of this brief.

## SUMMARY OF ARGUMENT

Retail transactions involve merchants and consumers. Conversations involve speakers and listeners. This case melds both kinds of relationships, involving merchants as otherwise willing speakers and consumers as otherwise willing listeners. Unfortunately, here the merchants are not allowed to speak as they wish and the consumers, in turn, are prohibited from receiving important information from merchants.

*Amicus curiae* argues that New York General Business Law § 518 interferes with the First Amendment speech rights of two groups of stakeholders in the Empire State – merchants and consumers – not merely one. Specifically, the statute detrimentally affects not only the right of merchants to freely communicate truthful pricing information regarding surcharges to their consumers, but it also hinders the reciprocal and derivative First Amendment right of consumers to receive truthful information that may directly influence their personal decision making and spending choices regarding how to pay for products and use finite fiscal resources.

There is a rich and lengthy tradition of protecting the right to receive speech in First Amendment jurisprudence, both at the level of this Court and that of the federal appellate circuit from which this cases arises. See *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) (observing that the First Amendment "necessarily protects the right to receive" literature); *Spargo v. New York State Comm'n on Judicial Conduct*, 351 F.3d 65, 83 (2d Cir. 2003) ("it is well-established that the First Amendment protects not only

the right to engage in protected speech, but also the right to receive such speech"). Indeed, "courts have recognized in a variety of contexts that a right to free speech is not held just by speakers. Listeners, too, have a First Amendment right to receive speech." Jennifer A. Chandler, *A Right to Reach an Audience: An Approach to Intermediary Bias on the Internet*, 35 Hofstra L. Rev. 1095, 1100 (2007).

Of particular importance for this case, one such context where the First Amendment right to receive speech is paramount is the realm of commercial speech. As this Court wrote four decades ago, "[a]s to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Va. State Bd. Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976).

*Amicus* thus concentrates on the First Amendment right of consumers to receive speech in *Expressions Hair Design* and, specifically, to hear a higher price imposed for a credit-card purchase as involving a surcharge. *Amicus* asserts that New York's no-surcharge law inhibits the free flow of accurate pricing information to consumers and, in doing so, keeps them ignorant about the reality of swipe fees and surcharges and, ultimately, the actual cost of credit.

Such fiscal ignorance may be anything but bliss for consumers when New York merchants choose to charge two prices for the same product (a higher one for credit card purchases and a lower one for cash purchases). That's because research indicates that, due to cognitive perceptual biases, consumers respond quite differently

to the labels "surcharge" and "discount." See Jonathan Slowik, *Comment: Credit CARD Act II: Expanding Credit Card Reform by Targeting Behavioral Biases*, 59 UCLA L. Rev. 1292, 1328 (2012) ("consumers react much less intensely to discounts than they do to surcharges"). The way consumers respond to truthful pricing information depends, in brief, on how it is framed, including which price is framed as the baseline or anchor point for the "regular" price and whether a change or deviation from it is framed as an addition or subtraction. See Alison M. Newman, *Note: Doing the Public a Disservice: Behavioral Economics and Maintaining the Status Quo*, 64 Duke L.J. 1173, 1190 (2015) ("A cash discount does not feel like a loss to credit-card users; it is instead perceived as a forgone gain. If, however, the payment were framed as a charge for using a card, the consumer would view it as a loss because he would be paying more than the baseline cost paid by cash consumers").

This raises the critical question of whether consumers have a reciprocal First Amendment right to receive truthful information as framed and intended by merchant-speakers, without the government of New York placing a thumb on the scale of free expression that permits framing price information only in the manner it paternalistically deems acceptable. *Amicus* contends that consumers possess an unenumerated First Amendment right to receive truthful speech from those with whom they choose do business that describes the cost of credit as a credit-card surcharge.

*Amicus* thus respectfully requests that this Court grant the petition for writ of certiorari to decide whether no-surcharge laws like that in New York, as

well as similar ones in other populous states, including but not limited to California (Cal. Civ. Code § 1748.1(a)), Florida (Fla. Stat. § 501.0117 (2016)), and Texas (Tex. Fin. Code § 339.001 (2016)), violate the First Amendment right of consumers to receive truthful information that affects their personal, fiscal decision making.

## ARGUMENT

### I. The Right to Receive Speech is a Fundamental Corollary of the Right to Speak

Professor Marc Blitz explains that a listener's right to receive information "is simply the mirror image of the speaker's right to express it. And the First Amendment cannot protect one without meaningfully protecting the other." Marc J. Blitz, *Constitutional Safeguards for Silent Experiments in Living: Libraries, the Right to Read, and a First Amendment Theory for an Unaccompanied Right to Receive Information*, 74 UMKC L. Rev. 799, 809 (2006). Indeed, without both a listener and a speaker, the free speech guarantee is, in the words of First Amendment scholar and current Delaware Law School Dean Rodney Smolla, "as empty as the sound of one hand clapping." Rodney A. Smolla, *Free Speech in an Open Society*, 198 (1992).

The First Amendment right to receive speech, however, is not merely the conjecture of academics and scholars. In fact, it is well established in this Court's jurisprudence.

More than fifty years ago, this Court wrote that "[t]he right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive . . ." *Griswold v.*

*Connecticut*, 381 U.S. 479, 482 (1965). It struck down the statute in *Griswold*, which harmed the free flow of "information, instruction, and medical advice to married persons as to the means of preventing conception." *Ibid.* at 480.

Four years later, this Court concluded, in holding unconstitutional a state statute that banned the possession of obscenity, that "[i]t is now well established that the Constitution protects the right to receive information and ideas." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). It added then that "[t]his right to receive information and ideas, regardless of their social worth, see *Winters v. New York*, 333 U.S. 507, 510 (1948), is fundamental to our free society." *Ibid.*

In 1976, this Court reiterated the importance of the right to receive speech, noting that when there is a willing speaker, the First Amendment "protection afforded is to the communication, to its source and to its recipients both." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976). Critically, the Virginia statute banned the ability of licensed pharmacists to convey to consumers, via direct or indirect advertising, truthful and factual price information about prescription drugs. *Ibid.* at 750, n.2. The law was challenged by "prescription drug consumers." *Ibid.* at 753. They argued "that the First Amendment entitles the user of prescription drugs to receive information that pharmacists wish to communicate to them through advertising and other promotional means, concerning the prices of such drugs." *Ibid.* at 754.

The Court determined that, "[a]s to the particular consumer's interest in the free flow of commercial

information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Ibid.* at 763. The Court therefore struck down the Virginia statute so that consumers could make better informed choices when purchasing drugs, remarking that "[s]o long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed." *Ibid.* at 765.

The *Virginia State Board of Pharmacy* decision laid the foundation for a commercial speech doctrine under which, as current Yale Law School Dean Robert Post describes it, "[c]ommercial speech is protected so that citizens can receive information." Robert C. Post, *Viewpoint Discrimination and Commercial Speech*, 41 Loy. L.A. L. Rev. 169, 177 (2007). Indeed, the consumer's interest in the free flow of information has been this Court's "longstanding focus, in the commercial speech area." *American Meat Inst. v. U.S. Dep't Agriculture*, 760 F.3d 18, 29 (D.C. Cir. 2014). As the Supreme Judicial Court of Massachusetts recently wrote, the "interests of consumers in receiving commercial information, and the interests of society in the free flow of such information, have been the foundation of commercial speech doctrine from its inception." *Bulldog Investors Gen. P'ship v. Sec'y of Commonwealth*, 953 N.E.2d 691, 716 (Mass. 2011).

This Court has observed, in turn, that "[t]he First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good."

*44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996).

## II. New York General Business Law § 518 Violates, in Paternalistic Fashion, the First Amendment Right of Consumers to Receive Truthful Information that Affects Their Purchasing Decisions

Unfortunately, by permitting the framing of price information in only the manner the government of New York deems fit, consumers are kept in the dark about the cost of credit. This is particularly troubling because research suggests that when consumers are made aware of surcharges imposed when paying with credit cards, they tend to avoid paying with credit cards. That is because a surcharge is perceived as a loss of money.

One article, for example, points out that "when considering the relative costs of two forms of payment, consumers readily accept a 'discount for cash' but are offended by a 'surcharge for credit card use.' The critical difference is selecting either the higher or lower price as the anchor for evaluation, particularly since consumers value avoiding losses more than potential gains. Thus, commercial entities can influence our behavior as consumers by framing how we perceive their actions." Derek E. Bambauer, *Shopping Badly: Cognitive Biases, Communications, and the Fallacy of the Marketplace of Ideas*, 77 U. Colo. L. Rev. 649, 684 (2006). Another article asserts that credit card companies prefer use of the term "discount" and would rather bury the word "surcharge" because "consumers perceive a discount as a gain, but a surcharge as a penalty and will prefer to use another payment system

rather than be penalized for using credit." Adam Levitin, *The Antitrust Super Bowl: America's Payment Systems, No-Surcharge Rules, and the Hidden Costs of Credit*, 3 Berkeley Bus. L.J. 265, 281 (2006).

In a nutshell, prohibiting the free flow of information to consumers about surcharges imposed on credit card purchases keeps consumers in the dark about the hidden costs of credit. No-surcharge laws thus manipulate consumers' cognitive biases by concealing information from them. The Second Circuit, however, gave this short shrift, writing that "[t]he First Amendment poses no obstacle" to a no-surcharge law "spurring demand for credit-card use." *Expressions Hair Design v. Schneiderman*, 808 F.3d 118, 133 (2d Cir. 2015).

The bottom line here is, indeed, the financial bottom line: consumers have a First Amendment right to receive truthful information as disclosed and framed in a manner that merchants see fit – not only in the manner the government deems acceptable – in order to make better informed decisions about how they spend their money. New York's no-surcharge law paternalistically keeps them in the dark to the benefit of credit card companies. The First Amendment right of consumers to receive truthful commercial speech must not be lost or forgotten in *Expressions Hair Design*. This case thus provides the Court with a prime opportunity to return the commercial speech doctrine to its original foundation: to facilitate "the free flow of commercial information" among citizens, thereby "enlighten[ing] public decisionmaking in a democracy." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 764–65 (1976).

## CONCLUSION

For the reasons set forth above, *Amicus* respectfully requests that this Court grant Petitioners' Petition for a Writ of Certiorari and decide whether no-surcharge laws like that in New York and similar ones in other populous states, including but not limited to Florida, California and Texas, not only violate the First Amendment speech rights of merchants, but also violate the First Amendment rights of consumers to receive truthful information that affects their personal, fiscal decision making.

Respectfully submitted,

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